No.

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

83-5878

ALFRED B. SHAPIRO and GREGORY J. WENTZ,

Petitioners,

v.

DRUG ENFORCEMENT ADMINISTRATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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December 6, 1983

QUESTION PRESENTED*/

Whether the Privacy Act, 5 U.S.C. § 552a, constitutes a partial repeal of the Freedom of Information Act, 5 U.S.C. § 552, and thus constitutes the sole means by which individuals may seek disclosure of information about themselves that has been collected by federal law enforcement agencies, so that such individuals may categorically be denied access to information about themselves, in the unreviewable discretion of an agency head under Section (j)(2) of the Privacy Act, 5 U.S.C. § 552a(j)(2), while third-parties can be denied access to the same information only to the extent that parts of it may be exempt from disclosure, subject to judicial review, under the specific exemptions of the Freedom of Information Act, 5 U.S.C. § 552(b)(1)-(9).

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*/ Petitioners, who are individuals, were the only parties plaintiff in the district court. Respondent Drug Enforcement Administration, an agency of the federal government, was the only defendant below.

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PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Alfred B. Shapiro and Gregory J. Wentz respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, 1a-18a) is not yet reported. The memorandum opinion of the district court (App. B, infra, 19a-24a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. C, infra, 25a) was entered on November 16, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant provisions of the Freedom of Information Act, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a, are set forth in Appendix I (see App. I, infra, 35a-40a).

STATEMENT

The Requests

In May 1981, Gregory J. Wentz, who was then a federal prisoner, filed a request under the Privacy Act, 5 U.S.C. § 552a, and the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, asking that DEA provide him with copies of agency records pertaining to him (App. A, infra, 2a). In July 1981, Mr. Wentz filed a further request, seeking disclosure of DEA records used in preparing a pre-sentence report following his conviction (O.R. Item 19 (Wentz)). In March 1982, when DEA still had not acted on these requests, Mr. Wentz commenced this action to require release of the requested materials (App. A, infra, 2a). Pursuant to the Privacy Act, Mr. Wentz later amended his complaint to seek the correction of certain errors he believed to be contained in his DEA records (ibid.). In April 1982, DEA denied Mr. Wentz's requests (ibid.). The agency asserted (ibid.) that all of the requested documents were exempt from disclosure under the Privacy Act because they were contained in the DEA Investigative Reporting and Filing System, which had been declared by regulation to be exempt from disclosure under Section (j)(2) of the Privacy Act, 5 U.S.C. § 552a(j)(2), and, further, that the documents were exempt from disclosure as a matter of law under Exemption 3 of FOIA, 5 U.S.C. § 552(b)(3).

In October 1981, Alfred B. Shapiro, who was then a federal prisoner, filed a similar request under FOIA and the Privacy Act, seeking access to DEA records pertaining to him (App. A, infra, 2a). In May 1982, when DEA still had not acted on Mr. Shapiro's request, he brought suit to require disclosure of the requested documents (ibid.). In June 1982, DEA advised Mr. Shapiro that the documents he sought

were contained in the DEA Investigative Reporting and Filing System and were therefore exempt from disclosure under both statutes (ibid.).

The District Court Proceedings

DEA moved for summary judgment in both actions, based upon virtually identical affidavits authored by Mr. Russ Arslan, the DEA official in charge of such requests (App. A, infra, 4a-5a & n.4), who asserted that all the requested documents were contained in a system of records that had been exempted from disclosure by a regulation (28 C.F.R. § 16.98) properly promulgated under Section (j)(2) of the Privacy Act, 5 U.S.C. § 552a(j)(2).

On August 4, 1982, the United States District Court for the Western District of Wisconsin denied Mr. Wentz's motion to require DEA to prepare a Vaughn index of the requested materials (App. F, infra, 28a-30a). The two cases were consolidated for decision and, on October 8, 1982, the district court granted DEA's motions for summary judgment (App. B, infra, 19a-24a). The district court held that the requested records were exempt from disclosure under Section (j)(2) of the Privacy Act because they were contained in a system of records which DEA had, by regulation (28 C.F.R. § 16.98(c)), properly exempted from disclosure (App. B, infra, 22a-23a). The district court further held that the Privacy Act is an exempting statute under Exemption 3 of FOIA, 5 U.S.C. § 552(b)(3), and that the records were therefore also exempt from disclosure under FOIA (App. B, infra, 21a). Finally, the district court upheld the agency's determination that Section (j)(2) applies to the correction provisions of the Privacy Act, 5 U.S.C. § 552a(g)(4), and therefore determined that the agency had correctly denied Mr. Wentz's request for such relief (App. B, infra, 23a).

On November 16, 1982, the district court granted leave to Mr. Shapiro and Mr. Wentz to proceed on appeal in forma pauperis (App. G, infra, 31a-32a; App. H, infra, 33a-34a).

The Court of Appeals Proceedings

On November 16, 1983, the Seventh Circuit affirmed the judgments in both cases (App. A, infra, 1a-18a). First, the court of appeals held (App. A, infra, 4a-5a) that the requested records were exempt from disclosure under the Privacy Act because the affidavits submitted by DEA established that the records were contained in its Investigative Reporting and Filing System, which, pursuant to the procedures mandated by Section (j)(2) of the Act, 5 U.S.C. § 552a(j)(2), had been declared by regulation (28 C.F.R. § 16.98(c)) to be exempt from disclosure.

Second, the court held that DEA was not required to prepare a Vaughn index because Section (j)(2) of the Privacy Act, unlike the particularized exemptions of FOIA (5 U.S.C. § 552(b)), applies to entire systems of records (App. A, infra, 5a). Once it has been determined that the requested information is contained in a system of records that has been exempted from disclosure in compliance with the procedural requirements of Section (j)(2), the court held, there is no need to prepare an index of withheld documents because no further judicial inquiry is required (App. A, infra, 5a-6a).

Third, the court of appeals held that the requested records were also exempt under FOIA (App. A, infra, 6a-17a). In reaching this conclusion, the court relied on FOIA Exemption 3, 5 U.S.C. § 552(b)(3), which "provides that the FOIA does not apply to information 'specifically exempted' by other statutes" (App. A, infra, 6a; footnote omitted). As

the court noted, "to qualify under FOIA Exemption 3, a statute must specifically exempt the requested information from disclosure, and either must 'leave no discretion on the issue' of disclosure, or must establish particular criteria for withholding' or refer to 'particular types of matters to be withheld'" (App. A, infra, 8a; quoting 5 U.S.C. § 552(b)(3)). While the court recognized that the plain language of Section (j)(2) grants uncanalized discretion to an agency head to exempt "any system of records within the agency from [the disclosure and other requirements of] any part of this section," that is, the Privacy Act, the court held that this provision also exempts such records from disclosure under FOIA Exemption 3, 5 U.S.C. § 552(b)(3) (App. A, infra, 9a; emphasis in original). The court further held that "[s]ince [Section] (j)(2) also covers requests for corrections, the denial of Wentz's request for correction of the allegedly inaccurate records also was proper" (App. A, infra, 17a).

Although the court recognized that Section (b)(2) of the Privacy Act, 5 U.S.C. § 552a(b)(2), specifically preserves FOIA disclosure obligations, the court held that this savings clause applies only to so-called "third-party requests," that is, to requests by persons who are seeking information about others, rather than themselves (App. A, infra, 10a). The court believed that this construction, which would "allow[] both acts to retain their full meaning" (App. A, infra, 15a), was buttressed by the legislative history, which the court found to reflect Congress's intention to safeguard "'particularly sensitive information'" by limiting the access of individuals to "'their own intelligence or investigative files'" (App. A, infra, 12a; quoting H.R. Rep. No. 93-1416, 93d Cong., 2d Sess. 18 (1974) and S.Rep. No. 93-1183, 93d Cong., 2d Sess. 23 (1974)).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW DIRECTLY CONFLICTS WITH PRIOR DECISIONS OF TWO OTHER CIRCUITS ON AN IMPORTANT QUESTION OF FEDERAL LAW.

The court below held that Section (j)(2) of the Privacy Act, 5 U.S.C. § 552a(j)(2), renders inapplicable the disclosure provisions of FOIA, 5 U.S.C. § 552, in cases in which an individual seeks access to information that a government law enforcement agency has compiled about him. If such information is contained in a system of records that has been exempted from disclosure under Section (j)(2) of the Privacy Act, 5 U.S.C. § 552a(j)(2), the information is also exempt from disclosure, the court held, under the independent provisions of FOIA. Whether the exemption contained in Section (j)(2) bars disclosure under FOIA, as well as under the Privacy Act, is an important question of federal law.

In attempting to resolve this question, the courts of appeals have exhaustively considered the relevant statutory language and legislative history, but have been unable to reach consistent results and have settled into a clear pattern of conflict. The decision below is consistent with the Seventh Circuit's prior decision in Terkel v. Kelly, 599 F.2d 214 (1979), cert. denied, 444 U.S. 1013 (1980), and with the Fifth Circuit's decision in Painter v. FBI, 615 F.2d 689 (1980). However, the decision below is irreconcilable with the decisions of the District of Columbia Circuit in Greentree v. United States Customs Service, 674 F.2d 74 (1982), and the Third Circuit in Porter v. United States Department of Justice, 717 F.2d 787 (1983), and Provenzano v. United States Department of Justice, 717 F.2d 799, reh. denied, ___ F.2d ___ (Nov. 10, 1983).

Given the importance of the question presented and the irreconcilable conflict among the courts of appeals on this question, review by this Court is now warranted.

A. The Question Presented Is An Important Question Of Federal Law.

Although FOIA provides that disclosure must be made to "any person" (5 U.S.C. § 552(a)(3)), except to the extent that certain information may be exempt from disclosure under one of the nine specific FOIA exemptions (see 5 U.S.C. § 552(b)(1)-(9)), the court below held that the disclosure rights of persons who seek information about themselves are limited to those granted by Section (d) of the Privacy Act, 5 U.S.C. § 552a(d), which may, in turn, be wholly abrogated by regulation under Section (j)(2), 5 U.S.C. § 552a(j)(2). The court's holding rests upon the premise that Section (j)(2) of the Privacy Act constitutes a FOIA Exemption 3 statute (see 5 U.S.C. § 552(b)(3)), that is, that it is a statute which constitutes a specific bar to disclosure.

The result of the court's holding is that "third-party" requesters (persons who seek information about others) and legal persons (such as corporations, which are not subject to the Privacy Act) will be afforded access to whatever information they seek, except to the extent that some of it may fall within one of the nine specific FOIA exemptions (5 U.S.C. § 552(b)(1)-(9)), in which case segregable portions may be withheld, subject to judicial review. On the other hand, "first-party" requesters (persons seeking information about themselves) will categorically be denied access to any information contained in any system of records which an agency head has declared by regulation to be exempt from disclosure under Section (j)(2) of the Privacy Act, 5 U.S.C. § 552a(j)(2). Pursuant to the court's reasoning,

first party requesters will not be entitled to the production of any segregable portions of records, to a Vaughn index (see Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974)), or to in camera review of the records.

Whether this anomalous result is required by the language or legislative history of these two statutes is an important question of federal law that has been heavily litigated in the lower federal courts. See App. A, infra, 7a-8a (citing cases). Federal law enforcement agencies routinely collect vast amounts of information, which is used in numerous ways that affect the lives of individuals and the well-being of our society. The purpose of both FOIA and the Privacy Act is to make government more accountable to the people and "to respond to the potential excesses of government." Greentree v. United States Customs Service, 674 F.2d 74, 76 (D.C. Cir. 1982). Individuals who have a particularized interest in government information gathering, based upon their belief that the government has acted improperly in gathering information about them, have a special incentive to seek out the truth about government investigative activities and therefore help to protect the rights of all Americans. Whether Congress intended, in enacting the Privacy Act, to withdraw from the subjects of government records the disclosure rights granted by FOIA to all members of the public is a singularly important question of law.[1/] Whether such persons are entitled by law to have their requests considered under the same criteria applied to

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1/ The applicablity of FOIA to first-party requests is, of course, a threshold question. If FOIA applies to such requests, further proceedings will be required to determine whether any parts of the requested information are exempt from disclosure under the specific exemptions contained in FOIA. See, e.g., Greentree v. United States Customs Service, supra, 674 F.2d at 88.

requests made by members of the public is too important a question to be resolved by the place in which a lawsuit happens to be filed.[2/] Because the courts of appeals have exhaustively considered this question and have settled into a clear pattern of conflict, review by this Court is now warranted.

B. An Irreconcilable Conflict Exists Among The Courts Of Appeals On This Issue.

The Seventh Circuit's decision in the case at bar follows its earlier decision in Terkel v. Kelly, 599 F.2d 214 (1979), cert. denied, 444 U.S. 1013 (1980), and is consistent with the Fifth Circuit's decision in Painter v. FBI, 615 F.2d 689 (1980). In Terkel, the Seventh Circuit upheld the FBI's invocation of Section (k)(5) of the Privacy Act, 5 U.S.C. §552a(k)(5), as a barrier to disclosure on the ground that "the Freedom of Information Act cannot compel the disclosure of information that the Privacy Act clearly contemplates to be exempt" (599 F.2d at 216). In Painter, the Fifth Circuit followed Terkel and upheld the right of the FBI to withhold records, rejecting the district court's conclusion that "Congress did not intend Privacy Act exemptions to be applicable in FOIA cases" (615 F.2d at 690).

However, the decision below is wholly irreconcilable with the decision of the District of Columbia Circuit in Greentree v. United States Customs Service, 675 F.2d 74, 86-88 (1982), which explicitly rejected as unsound the holdings in Terkel and Painter. The Greentree court rejected

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2/ Moreover, absent resolution of this conflict, more sophisticated requesters will doubtless engage in forum-shopping because both FOIA and the Privacy Act provide that suit may be brought in the District of Columbia, among other places. See Section (a)(4)(B) of FOIA, 5 U.S.C. § 552(a)(4)(B); Section (g)(5) of the Privacy Act, 5 U.S.C. § 552a(g)(5). The accessibility of government records should depend upon principle and not upon the wiliness of requesters.

the government's contention that the exemption from disclosure contained in Section (j)(2) of the Privacy Act extends to FOIA as well as to the Privacy Act itself. As the court noted (674 F.2d at 79), Section (j)(2) explicitly refers only to disclosures otherwise required by "this section," that is, the Privacy Act. This exemption is therefore "self-contained" and "limit[s] only other provisions of the Privacy Act itself" (674 F.2d at 79).[3/] The court also rejected the government's contention that Section (b)(2) of the Privacy Act, 5 U.S.C. § 522a(b)(2), which clearly preserves FOIA disclosure rights, applies only to third-party requesters. As the court stated (674 F.2d at 79), "we are not at liberty to limit the safeguards of (b)(2), which extend to requests by 'any person.'"

The Greentree court also found that the relevant legislative history was consistent with the plain language of the Privacy Act (674 F.2d at 81-84). Moreover, as the court noted, "Congress was considering the Privacy Act while it was preparing to override President Ford's veto of the 1974 FOIA amendments" (674 F.2d at 83), amendments to which President Ford objected because they "increased accessibility of national security and law enforcement documents . . . [under FOIA] Exemptions 1 and 7" (674 F.2d at 84). Thus, as the court explained (674 F.2d at 84): "We are hard pressed

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3/ This construction of Section (j)(2) does not diminish its importance in the overall statutory scheme. The Privacy Act provides numerous rights, in addition to disclosure, to first-party requesters. For example, Section (e)(2) requires that an agency "collect information to the greatest extent practicable directly from the subject individual" (5 U.S.C. §552a(e)(2)); Section (e)(3)(B) requires that the individual be told of "the principal purpose or purposes for which the information is intended to be used" (5 U.S.C. §552a(e)(3)(B)); and Section (d)(2) permits "the individual to request amendment of a record pertaining to him" (5 U.S.C. §552a(d)(2)). The discretion granted to agency heads by Section (j)(2) to exempt systems of investigatory records from such requirements is clearly significant in itself. See pages 15-16, infra.

to accept an interpretation of the Privacy Act that in effect repeals, for first party requesters, those amendments only a few weeks after they were enacted over a Presidential veto."

Finally, the Greentree court was impressed by "the fact that the predominant government policy since initial implementation until this appeal has been to allow an individual to seek access to information about himself through both the Privacy Act and FOIA" (674 F.2d at 85; footnotes omitted). In 1975, as the court noted, the OMB, the agency charged by Congress with developing government-wide implementing regulations under the Privacy Act, concluded that the two statutes should be construed so as "to assure [that] individuals do not, as a consequence of the Privacy Act, have less access to information pertaining to themselves than they did prior to its enactment" (674 F.2d at 86 n.28, quoting 40 Fed. Reg. 56743 (1975)).4/

4/ The OMB's contemporaneous construction of the Privacy Act is entitled to great weight because it is the construction of those government officials specifically charged by Congress "'. . . with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are as yet untried and new.'" Power Reactor Development Co. v. Electricians, 367 U.S. 396, 408 (1961), quoting Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315 (1933). Moreover, the same conclusion was reached by the Privacy Protection Study Commission, which was established by Congress under Section 5 of the Privacy Act, Pub.L. 93-579, §5 (Report of Privacy Protection Study Commission App. 4 at 37 (1977)). The earliest commentators also took the same position. See Note, The Privacy Act of 1974: An Overview, 1976 Duke L. J. 301, 312-13. See also Comment, The Freedom of Information Act's Privacy Exemption and the Privacy Act of 1974, 11 Harv. Civ. Rights-Civ. Lib. L. Rev. 596, 624-26 (1976); Hulett, Privacy and the Freedom of Information Act, 27 Ad. L. Rev. 275, 288 (1975); Project, Government Information and the Rights of Citizens, 73 Mich. L. Rev 971, 1338-39 (1975). Cf. K. Davis, Ad. Law Treatise § 5.43 at 53 (2d ed. 1980 Supp.).

On August 10, 1983, the OMB published a contrary regulation for public comment. The new regulation provides that "[t]he Privacy Act and the FOIA should be read together to

(Footnote continued on following page.)

The decision below is also irreconcilable with the Third Circuit's decisions in Porter v. United States Department of Justice, 717 F.2d 787 (1983), and Provenzano v. United States Department of Justice, 717 F.2d 799 (1983), reh. denied, ____ F.2d ____ (Nov. 10, 1983). In Porter, the principal opinion, the Third Circuit noted its agreement with the Greentree court's "searching analysis of the interrelationship between the two statutes" (717 F.2d at 796), but proceeded to make an independent review of the language and legislative history (717 F.2d at 796-799). The Third Circuit, like the District of Columbia Circuit, explicitly rejected the holdings in Terkel and Painter because it found nothing in the language or legislative history of the statutes "which suggests that Congress intended Privacy Act section 552a(d) to be a partial repeal of the Freedom of Information Act by making it the sole means of access for first-party information" (717 F.2d at 798). Also like the District of Columbia Circuit, the Porter court noted that its construction was not only the one given the statute shortly after its enactment by the agency charged by Congress with its implementation, but the one that the government had followed until it filed its appellate brief in Greentree (717 F.2d at 798-99).[5/]

(Footnote continued from preceding page.)

permit an agency to deny access to records sought by the subject individual under the FOIA on the basis of exemption (b)(3) if those records are exempted from release to the individuals under the Privacy Act" (48 Fed. Reg. 36359). The only explanation that the OMB offered for this change was that "[t]his interpretation is supported by the majority of courts that have reviewed the question of the relationship between the two laws" (id.).

5/ See also Clarkson v. IRS, 678 F.2d 1368, 1376 (11th Cir. 1982) (Tuttle, J.) (quoting Guidebook to the Freedom of Information and Privacy Acts 21-22 (R. Bouchard & J. Franklin ed. 1980) (a person may use "'the Privacy Act or the FOIA or both to seek access to information about himself in agency records and is entitled to the cumulative total of access rights under the two Acts'")).

Just as the Greentree and Porter courts rejected the reasoning of Terkel and Painter, the Seventh Circuit in the case at bar explicitly rejected the holdings in Greentree and Porter and "reaffirmed our earlier decision" in Terkel (App. A, infra, 8a). Four circuits have now considered this question, and, despite exhaustive consideration of the statutory language and legislative history, they have been unable to reach consistent results. The issue presented is therefore ripe for review by this Court.

II.

THE DECISION BELOW IS INCORRECT AS A MATTER OF LAW.

The court below held that FOIA, 5 U.S.C. § 552, provides no rights to individuals seeking access to government records pertaining to themselves. The court held that access by individuals to such materials is available only under the Privacy Act, which, however, specifically provides that an agency head may exempt from disclosure whole systems of records. The holding below, which effectively repeals FOIA insofar as first-party requesters are concerned, is incorrect.

A. The Language And Legislative History Demonstrate That Congress Did Not Intend The Privacy Act As A Partial Repeal Of FOIA.

The language of Section (j)(2) of the Privacy Act evidences no congressional intent that the Privacy Act should be deemed the exclusive means for first-party requesters to gain access to government records pertaining to themselves. Indeed, the statutory language specifically provides to the contrary. In terms, the exemption from disclosure contained in Section (j)(2) applies only to disclosures required by "any part of this section," that is, the Privacy Act. As the District of Columbia Circuit has held, this

portion of the Privacy Act is "self-contained" and "limit[s] only other provisions of the Privacy Act itself." Greentree v. United States Customs Service, 674 F.2d 74, 79 (1982). "Had Congress intended to authorize the creation by regulation of exemptions from the Freedom of Information Act it would have used language such as 'this title' rather than 'this section.'" Porter v. United States Department of Justice, 717 F.2d 787, 797 (3d Cir. 1983). In addition, Section (b)(2) of the Privacy Act, 5 U.S.C. § 552a(b)(2), specifically preserves whatever rights of disclosure already exist under FOIA and, contrary to the holding below, makes no distinction whatever between "first-party" and "third-party" requesters.

As the District of Columbia Circuit noted in Greentree (674 F.2d at 81-84), the legislative history of the Privacy Act is fully consistent with the plain language of the statute, as are the more general circumstances in which Congress enacted this statute. The Privacy Act was enacted only 40 days after Congress had overridden President Ford's veto of the 1974 FOIA amendments, which the president had vetoed because they substantially narrowed agency discretion to withhold investigatory files under Exemption 7. See 10 Weekly Comp. of Pres. Docs. 1318 (1974). Prior to the 1974 FOIA amendments, the courts had upheld the nondisclosure of any information that happened to be maintained in a law enforcement "file," but Congress disagreed with that broad construction of Exemption 7 (see H.R. Conf. Rep. No. 93-1380, 93rd Cong., 2d Sess. 12 (1974)) and determined that the scope of Exemption 7 should be narrowed to include "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would be harmful to one of six specific law enforcement interests." House Comm. on Gov't Operations and Senate Comm. on the

Judiciary, Freedom of Information Act and Amendments of 1974 (P.L. 93-502), Source Book: Legislative History, Texts and Other Documents, 94th Cong., 1st Sess. 332 (Jt. Comm. Print) (1975) (emphasis added).

Contrary to the holding below, it is inconceivable that Congress would have intended to rebuild in the Privacy Act the very same impenetrable barrier to disclosure of "investigatory files" that it had dismantled, by overriding a presidential veto, only 40 days earlier.[6/] Moreover, the fragments of legislative history upon which the court below relied (see App. A, infra, 11-13) in reaching the opposite conclusion lend no support to it. Those fragments show only that Congress recognized that the Privacy Act would itself create disclosure and other rights far broader than those created by FOIA and, indeed, merely manifest Congress's intention that the subjects of law enforcement records should not be entitled to those broader rights. See Sections (d) and (e) of the Privacy Act, 5 U.S.C. §552a(d) and (e). See also page 10, note 3, supra. That Congress expressed concern regarding access to investigatory files under the more far-reaching provisions of the Privacy Act does not demonstrate that Congress intended Section (j)(2) of the Privacy Act to preclude disclosure under FOIA in

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6/ As the District of Columbia Circuit noted in Greentree, the government had forcefully made this point in its district court brief in that case, which stated (674 F.2d at 85 n.27):

> "It would be anomalous indeed for Congress to override a presidential veto, which was in part based on Congress' narrowing of exemption 7, only to reinstate forty days later (via the Privacy Act) the discretionary power to deny total access to investigatory material. There is no indication whatsoever in the legislative history of the Privacy Act to indicate that Congress intended such an abrupt reversal of its recent narrowing of exemption 7."

those circumstances in which disclosure was required under the standards independently established by FOIA. In short, the decision below is based principally on presumed considerations of public policy, rather than on the language and legislative history of the two statutes at issue here.

B. Section (j)(2) Of The Privacy Act Is Not An Exemption 3 Statute.

Section (j)(2) of the Privacy Act would not meet the statutory requirements of FOIA Exemption 3 even if Section (j)(2) were not, as it is, specifically self-contained and limited in its applicability to other provisions of the Privacy Act. FOIA Exemption 3 exempts from disclosure matters that are "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3).

Section (j)(2) does not meet the requirements of Proviso A because Section (j)(2) grants totally uncanalized discretion to an agency head. Section (j)(2) gives the agency head "cart blanche to withhold any information he pleases." H.R. Rep. No. 94-880, pt. 1, 94th Cong., 2d Sess. 23 (1976). Similarly, Section (j)(2) does not meet the particularity requirements of Proviso B. By allowing an agency head to exempt from disclosure all of an agency's systems of investigatory files, Section (j)(2) does not establish "particular criteria for withholding," nor does it refer "to particular types of matters to be withheld."

In 1976, Congress amended Exemption 3 of FOIA to overrule FAA v. Robertson, 422 U.S. 255 (1975), in which

this Court held that certain withholding provisions of the Federal Aviation Act qualified as an Exemption 3 statute. See H.R. Rep. No. 94-880, pt. 1, 94th Cong., 2d Sess. 23 (1976). See also Note, The Effect of the 1976 Amendment to Exemption Three of the Freedom of Information Act, 76 Colum. L. Rev. 1029 (1976). Section (j)(2) of the Privacy Act is no more particularized than was the statute at issue in Robertson. Moreover, the statutory language "any system of records" is certainly broader than the phrase "investigatory files . . . compiled for law enforcement purposes," which, as the Ninth Circuit has held, fails to meet the particularity requirements of Exemption 3 because it provides "insufficient specificity to take it out of the impermissible range of agency discretion to make decisions rightly belonging to the legislature." Church of Scientology v. United States Postal Service, 633 F.2d 1327, 1333 (9th Cir. 1980).

When Congress amended Exemption 3 in 1976, it intended to distinguish between those statutes which "in some manner told the official what to do about disclosure and those that did not significantly inform his discretion in that regard." American Jewish Congress v. Kreps, 574 F.2d 624, 629 (D.C. Cir. 1978) (emphasis in original). Section (j)(2) is not an Exemption 3 statute because "Congress did not want the exemption to be triggered by every statute that in any way gives administrators discretion to withhold documents from the public." Irons & Sears v. Dann, 606 F.2d 1215, 1219-20 (D.C. Cir. 1979), cert. denied, 444 U.S. 1075 (1980) (footnote omitted). See also CPSC v. GTE Sylvania, Inc., 447 U.S. 102, 121-22 n.18 (1980).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
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Dated: December 6, 1983.

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 82-2818 and 82-2819

ALFRED B. SHAPIRO and GREGORY J. WENTZ,

Plaintiffs-Appellants,

v.

DRUG ENFORCEMENT ADMINISTRATION,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Wisconsin.
Nos. 82 C 88 and 82 C 243—John C. Shabaz, *Judge.*

ARGUED SEPTEMBER 16, 1983—DECIDED NOVEMBER 16, 1983

Before BAUER, WOOD, *Circuit Judges*, and NEAHER,* *Senior District Judge.*

BAUER, *Circuit Judge.* Plaintiffs-appellants Shapiro and Wentz each were convicted in unrelated cases of violating 21 U.S.C. § 841 (1980), and both currently are serving prison terms. Shapiro and Wentz filed separate requests with the Drug Enforcement Administration (DEA) seeking access to their DEA files pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (1976)

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* The Honorable Edward R. Neaher, Senior Judge of the United States District Court for the Eastern District of New York, is sitting by designation.

(FOIA) and the Privacy Act, 5 U.S.C. § 552a (1975) (Privacy Act). The district court denied their requests on the ground that the records are exempt under Privacy Act Section (j)(2) (Exemption (j)(2)) and FOIA Section (b)(3) (Exemption 3). We affirm.

I. Background

In May 1981, Wentz filed a request with the DEA to obtain a copy of the DEA records pertaining to him; Shapiro made his request in October 1981. In April 1982, the DEA notified Wentz that all the documents he requested were in the DEA Investigative Reporting and Filing System and thus were exempt from access pursuant to Exemption (j)(2) of the Privacy Act and Exemption 3 of the FOIA. In June 1982, the DEA notified Shapiro that his request had been denied for the same reasons.

In March 1982, Wentz filed suit to compel release of the documents he had requested. Wentz later added a claim that the agency be required to correct allegedly inaccurate information in his files pursuant to the Privacy Act. Shapiro filed his suit in May 1982.

The district court consolidated the two cases because they raised identical issues. In October 1982, the district court granted the DEA's motions for summary judgment. The court held that the DEA had met the Privacy Act Exemption (j)(2) requirements by exempting these records from disclosure at 28 C.F.R. § 16.98(c). The district court also held that because the Privacy Act is a statute that exempts this information from disclosure, the information is exempt under FOIA Exemption 3 as well. Finally, the court held that since Privacy Act Exemption (j)(2) applies to the Act's correction provisions, Wentz's request for correction of the allegedly inaccurate records also must be denied.

II. Privacy Act Exemption (j)(2)

Congress enacted the Privacy Act in 1974. The Act guarantees individuals access to certain agency records about themselves, *see* 5 U.S.C. § 552a(d), and prevents the

release of such records to third parties without the consent of the individual except under specific instances, *see* 5 U.S.C. § 552a(b). The Privacy Act applies only to agency "records," which the Act defines as agency files or documents about individuals, contained in a "system of records," which is a group of agency records from which an agency retrieves information using the name of the individual or some other personal identifier. *See* 5 U.S.C. §§ 552(a)(4) and (5).

An individual's right of access under the Privacy Act is not unlimited, however. Sections (j) and (k) of the Act give agencies the discretion to refuse to disclose certain records. Under (j)(2), the head of an agency whose principal function is law enforcement may promulgate rules exempting from access any system of records containing information compiled for the purpose of criminal investigation.[1]

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[1] 5 U.S.C. § 552a(j)(2) provides:

> The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is—
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> • • •
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> (2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement,

(Footnote continued on following page)

The DEA has promulgated a regulation pursuant to Exemption (j)(2) that exempts its Investigative Reporting and Filing System from access to individuals.[2] The regulation justifies the exemption on the ground that access to such records would alert a subject to the existence of an investigation and thereby impede law enforcement efforts.[3] As the district court held, this explanation is sufficiently specific to satisfy the (j)(2) requirement that the regulation include reasons why the system is to be exempted.

Appellants' argument that this explanation renders the exemption inapplicable to them because they currently are imprisoned is without merit. First, the fact that appellants already have been convicted does not mean that the DEA is no longer investigating them. Moreover, Exemption (j)(2) does not require that a regulation's rationale for exempting a record from disclosure apply in each particular case. It is sufficient that the system of records be exempted properly, as the DEA has done here.

The DEA supported its motion for summary judgment in each case with an affidavit by Russ Arslan, the chief of

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[1] *continued*

release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

The Act labels this a "general" exemption, as opposed to the "specific" exemptions at 5 U.S.C. § 552a(k).

[2] The regulation appears at 28 C.F.R. 16.98(c).

[3] 28 C.F.R. 16.98(d)(3).

the DEA's Freedom of Information Division. The affidavits stated that all references to Wentz and Shapiro are contained in criminal investigatory files that have been exempted according to published regulations.[4]

Wentz and Shapiro argue that the Arslan affidavits are insufficient. They contend that this court should require the DEA to prepare a *Vaughn* index of the requested documents, which would oblige the agency to "specify in detail which portions of the document are disclosable and which exempt." *Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1977).

While courts mandate *Vaughn* indexing where an agency relies solely on an FOIA exemption to withhold information, the procedure does not apply to Exemption (j) of the Privacy Act. The FOIA exemptions are "specific" exemptions that apply only to individual documents; thus, courts require an indexed listing of the requested documents because "[w]hen the Government makes a general allegation of exemption, the court may not know if the allegation applies to all or only a part of the information." *Id.* at 825. In contrast, Privacy Act Exemption (j) applies to whole systems of records. The only requirements are that the agency's principal function be law enforcement, that the system of records be compiled

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[4] Arslan's affidavit in Wentz's case states:

> I hereby verify that each and every reference to the Plaintiff found in DEA records systems is subject to exemption (j)(2) of the Privacy Act (5 USC 552a) and further, that said references are contained in criminal investigatory files which are located in a system of records that has been properly exempted as published in the Department of Justice Regulations cited at 28 CFR 16.98 et. seq.

R. 14, at 3.

Arslan's affidavit in Shapiro's case is basically the same. See R. 7, at 2.

for the purpose of criminal investigation, and that the agency promulgate regulations exempting the system of records. As already noted, the DEA has met these requirements here. The Privacy Act requires nothing more from an agency seeking the (j)(2) exemption.[5] The district court thus properly held that the requested documents are exempt under the Privacy Act.

III. Freedom Of Information Act

Appellants Wentz and Shapiro next argue that they may obtain the requested records under the FOIA. Because their position conflicts with both the statutory language and legislative history of the FOIA and the Privacy Act, we affirm the district court's denial of access under the FOIA as well.

A. Background

Congress enacted the FOIA in 1966. The Act is a general disclosure statute whose purpose is to promote public access to federal government records. Just as the Privacy Act does not allow unlimited access to agency records, the FOIA contains exemptions that allow an agency to withhold records under certain circumstances; these nine "specific" exemptions are listed at 5 U.S.C. § 552(b).

Exemption 3, 5 U.S.C. § 552(b)(3), provides that the FOIA does not apply to information "specifically exempted" by other statutes.[6] The DEA has relied on Exemption

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[5] This conclusion is underscored by the Privacy Act's requirement of *de novo* review and possible *in camera* inspection if an agency invokes a Section (k) "specific" exemption. See 5 U.S.C. 552a(g)(3)(A). There is no such provision for agencies that seek the "general" exemptions in Section (j).

[6] 5 U.S.C. § 552(b)(3) provides:

> This section does not apply to matters that are—
>
> * * * *
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such

(Footnote continued on following page)

3 to deny appellants' request. It reasons that because the requested information is exempted from disclosure by the Privacy Act, the information also is unavailable under the FOIA. Wentz and Shapiro contend that the Privacy Act is not an Exemption 3 "statute," and thus the DEA may not use Exemption 3 to deny their request.

The district court held that the Privacy Act is a FOIA Exemption 3 statute. This holding is supported by our decision in *Terkel v. Kelly*, 599 F.2d 214 (7th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980). In *Terkel*, we held that the FBI was not required to disclose documents under the FOIA that were exempt from release under Privacy Act Exemption (k): "Although the Freedom of Information Act does not contain a comparable exemption, we agree with the lower court that the two statutes must be read together, and that the Freedom of Information Act cannot compel the disclosure of information that the Privacy Act clearly contemplates to be exempt." *Id.* at 216.

The Fifth Circuit also has held that requesters may not use the FOIA to avoid the Privacy Act nondisclosure provisions. In *Painter v. FBI*, 615 F.2d 689 (5th Cir. 1980), the court specifically held that the Privacy Act is a FOIA Exemption 3 statute. Several recent district court decisions also have held that an agency may not be compelled to disclose information under the FOIA if that information is exempt from disclosure under the Privacy Act. *See Martin v. FBI*, No. 83 C 123 (N.D. Ill. Sept. 30, 1983); *Rachel v. Department of Justice*, No. 83 C 0434 (N.D. Ill. Aug. 1, 1983); *Turner v. Ralston*, 567 F. Supp. 606 (W.D. Mo. 1983); *Anderson v. Huff*, No. 3-82-52 (D. Minn. June 8, 1982); *Heinzl v. Immigration and Natu-*

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* *continued*

statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

ralization Service, No. C-80-1210 (N.D. Cal. Dec. 17, 1981).

On the other hand, two circuit courts recently have held that the Privacy Act is not a FOIA Exemption 3 statute. *See Porter v. Department of Justice*, No. 82-1833 (3rd Cir. Sept. 15, 1983); *Provenzano v. Department of Justice*, No. 82-5681 (3rd Cir. Sept. 15, 1983); *Greentree v. U.S. Customs Service*, 674 F.2d 74 (D.C. Cir. 1982).

Appellants urge us to reconsider our holding in *Terkel v. Kelley*, *supra*. Upon close examination of both the statutory language and relevant legislative history, we are persuaded to reaffirm our earlier decision. We hold that the district court correctly decided that the Privacy Act's nondisclosure provisions apply to FOIA requests under FOIA Exemption 3.

B. The Literal Requirements of FOIA Exemption 3

In order to qualify under FOIA Exemption 3, a statute must specifically exempt the requested information from disclosure, and either must "leave no discretion on the issue" of disclosure, or must establish "particular criteria for withholding" or refer to "particular types of matters to be withheld." *See* 5 U.S.C. § 555(b)(3). Privacy Act Exemption (j)(2) clearly meets these requirements. First, its provisions specifically exempt the information requested here. Second, it describes the type of record to be withheld with sufficient specificity to meet the requirement that it refer to "particular types of matters to be withheld." Appellants' argument that Exemption (j)(2) vests too much discretion with the agencies is thus without merit.

Appellants contend that Congress still could not have intended the Privacy Act to be an Exemption 3 statute because nowhere in the legislative history of the Privacy Act or the 1976 proceedings that amended Exemption 3 did Congress refer to the Privacy Act as an Exemption 3 statute. This argument is also without merit, however, because appellants have not shown any congressional statement that the Privacy Act is *not* an Exemption 3 statute.

Rather, Congress set out specific criteria in Exemption 3, and the Privacy Act meets these requirements.

Appellants also argue that because Privacy Act exemption (j) exempts "any system of records within the agency from any part of *this* section" (emphasis added), it is limited to the Privacy Act itself, Section 552a. Yet this interpretation would allow a requester to bypass the Exemption (j) nondisclosure provision and seek the information through the FOIA instead. For reasons that we outline below in our discussion of Privacy Act Section (b)(2), this result is contrary to clearly stated congressional intent.

C. The Interrelationship of the Privacy Act and the Freedom of Information Act: Privacy Act Section (b)(2)

1. *Statutory Language*

In addition to the argument that the term "this section" at Exemption (j) renders the exemption inapplicable to the FOIA disclosure requirements, appellants contend that the Privacy Act Section (b)(2) specifically preserves the FOIA disclosure obligations. Section (b)(2) provides:

> No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—
>
> * * *
>
> (2) required under section 552 of this title [FOIA].

5 U.S.C. § 552a(b)(2).

Appellants argue that Section (b) is the provision designed to govern disclosure under the Privacy Act, and because Section (b) is not covered under Privacy Act Exemption (j),[7] Congress has exempted the FOIA disclosure

[7] *See supra* note 1.

requirements from Exemption (j).[8] For several reasons, however, we cannot accept this interpretation of the interrelationship of these two statutes. First, we disagree with appellants' reading of Section (b). The provisions of Section (b)(1)-(11) all require agency disclosure to a third party requester even though the individual to whom the record pertains has not consented to the disclosure. Yet the introductory language of Section (b) shows that the provisions of (b)(1)-(11) do not apply when the individual consents to disclosure. The language of this opening proviso shows that (b)(2) governs only third party requests for information; where the individual has made a first party request for information pertaining to himself, the FOIA exemption carved out at Section (b)(2) simply does not apply.[9] Section (d) provides sole access for first party requests under the Act.[10]

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[8] The court in *Greentree v. U.S. Customs Service*, 674 F.2d 74 (D.C. Cir. 1982), relied on this construction in reaching its conclusion.

[9] This conclusion is supported by the legislative history, which shows that Section (b)(2) was designed to protect third party access to agency records. *See* Subsection C, part 2 of text *infra*.

[10] 5 U.S.C. § 552a(d) provides in pertinent part:

> Each agency that maintains a system of records shall—
>
> (1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;
>
> (2) permit the individual to request amendment of a record pertaining to him and—

(Footnote continued on following page)

2. *Legislative History*

Second, appellants' position would result in an emasculation of Privacy Act Exemption (j)(2) that would be inconsistent with clearly articulated congressional intent. According to appellants' interpretation, any requester could use the FOIA to force an agency to disclose information even when that information is specifically exempt from disclosure under Exemption (j). The scope of Exemption (j) thus would be limited to the scope of any applicable FOIA exemptions. This limitation on Exemption (j) is contrary to the intent of Congress, however, as shown both by the exemption's language, which is broader than the FOIA exemption covering law enforcement records (Exemption 7), and by the relevant legislative history of the Privacy Act.

The legislative history reveals Congress' special concern that individuals not be permitted access to certain records containing information about their own criminal investigations. In its report on the Senate version of the Privacy Act, the Senate Government Operations Commit-

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[10] *continued*

> (A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date or receipt of such request, acknowledge in writing such receipt; and
>
> (B) promptly, either—
>
> (i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or
>
> (ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;
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> • • •

tee observed that law enforcement agencies often maintain files with "highly sensitive and usually confidential information collected by law enforcement officers in anticipation of criminal activity"; the report concluded that "it would not be appropriate to allow individuals to see their own intelligence or investigative files." S. Rep. No. 93-1183, 93d Cong., 2d Sess., at 23 (1974).

The House of Representatives Government Operations Committee report commented on the House version's exemption from disclosure for Central Intelligence Agency and criminal justice records and also concluded: "The Committee believes that such a broad exemption is permissible for these two types of records because they contain particularly sensitive information." H.R. Rep. No. 93-1416, 93d Cong., 2d Sess., at 18 (1974). This congressional concern that first party requesters not be allowed to require agencies to disclose criminal justice records relating to them is supported by Representative Moorehead's explanation of the Privacy Act when the legislation was presented on the House floor: "[e]ach individual shall be given access to his record within the system on his request, with the exception of files related to criminal investigations or national security." 120 Cong. Rec. 36644 (1974), *reprinted in* Legislative History of the Privacy Act of 1974, Source Book on Privacy 883 (1976) (hereinafter Source Book).

Appellants place great emphasis on the original Senate version of the Privacy bill, which contained a provision making the Act's nondisclosure provisions subject to other federal laws and regulations, *see* Section 205(b), S. 3418, Source Book at 143. This provision, they maintain, was included in the final compromise bill as Section (b)(2), and thus shows that Congress intended FOIA access to be unaffected by the Privacy Act nondisclosure provisions.

We cannot accept this interpretation of congressional intent. As noted above, in its final version Section (b)(2) is prefaced by an introductory proviso making it inap-

plicable where an individual requests access to his own records. Where Congress intended to retain provisions in the Senate bill that outlined other aspects of the relationship between the Privacy Act and the FOIA, it did so without qualification. For example, the original Senate version contained a provision that stated that an agency could not use FOIA exemptions to deny disclosure under a Privacy Act request, *see* S. 3418, 93d Cong., 2d Sess. § 205(a), *reprinted in* Source Book at 143. The final Act retained this provision in Section (q)[11] without any limiting provisos.[12]

Section (b)(2) apparently was included to guarantee that the access that the press and media enjoyed under the FOIA would not be curtailed by the Privacy Act. The Senate Report explained that an earlier version of Subsection (b)(2) was included in the Privacy bill "to meet the objections of press and media representatives that the statutory right of access to public records and the right to disclosure of government information might be defeated if such restrictions were to be placed on the public and press." S. Rep. No. 1183, 93d Cong., 2d Sess. 71 (1974), *reprinted in* Source Book at 224.

In response to our conclusion that their interpretation would render Privacy Act Exemption (j) virtually meaningless, appellants contend that under their position Exemption (j) would retain some meaning because it would exempt agencies from other requirements of the Act not related to disclosure. For example, an agency

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[11] No agency shall rely on any exemption contained in section 552 [FOIA] of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

5 U.S.C. § 552(a)(q).

[12] The Fifth Circuit relied on this reasoning to hold that the Privacy Act is an Exemption 3 statute. *See Painter v. FBI*, 615 F.2d 689 (5th Cir. 1980).

could rely on Exemption (j) to avoid many of the Section (e) requirements intended to insure that records are collected and maintained accurately. *See* 5 U.S.C. § 552a(e). *See also Greentree, supra*, 674 F.2d at 81.

Although Exemption (j) indeed specifically exempts agencies from complying with certain Privacy Act requirements besides disclosure, it also clearly exempts agencies from the disclosure provision, Section (d). Appellants' interpretation here is valid only if Section (b), to which Exemption (j) does not apply, covers both first party and third party requests. Since we are persuaded that Section (d) alone governs first party access, we must abide by the literal terms of Exemption (j) and hold that it exempts agencies from being required to disclose certain investigatory records to first party requesters.

Our conclusion is fortified by the legislative history of the Act. As we have noted, Congress expressed its concern that individuals not use the Act to gain access to sensitive criminal justice records. On the other hand, appellants have shown no examples of congressional concern that agencies be allowed to use the Privacy Act exemptions to avoid other Act requirements. We cannot ignore the clearly stated legislative intent and relegate the effect of the Act's exemptions to other provisions that apparently were less important to Congress.

Appellants also argue that various contemporary governmental interpretations of the Privacy Act contradict the government's current position. *See* OMB Report at 40 Fed. Reg. 56742-43 (1975); Justice Department Regulation at 28 C.F.R. 16.57. In response, the government notes that the Justice Department issued a letter several months after the Privacy Act was passed asserting that the Act was the exclusive avenue for first party requests, *see* Source Book at 1177-78, and that the OMB has proposed new guidelines stating that the Privacy Act is an Exemption 3 statute, *see* 48 Fed. Reg. 36359 (1983). These differing interpretations do not help us in our current task. Rather, they show only that government agen-

cies have been confused about the interrelationship between the Privacy Act and the FOIA.

In summary, the legislative history of the Privacy Act shows Congress' concern that individuals not use the Act to obtain access to their own criminal investigative files. It makes little sense to conclude that Congress would enact specific nondisclosure provisions in the Privacy Act to address this concern, while at the same time allowing individuals to bypass these exemptions by using the broader access terms of the FOIA.

3. *Effect of Government's Construction: Full Meaning for Both Acts*

Whereas appellants' interpretation would deprive the Privacy Act access exemptions of any effect beyond the scope of the FOIA exemptions, the government's construction allows both acts to retain their full meaning. On the one hand, agencies could refuse first party requests for the type of information described in Exemption (j), as the DEA did here. At the same time, the FOIA still would retain its vitality. For example, although FOIA Exemption 7 allows greater access to law enforcement data than does Privacy Act Exemption (j) in some instances, the FOIA exemption applies in many cases where the Privacy Act's exemption does not.[13] Exemption 7 governs any

[13] FOIA Exemption 7 states that:

> (b) This section does not apply to matters that are—
>
> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelli-

(Footnote continued on following page)

third party request, any request for documents that are not "records" within a "system of records," and any first party request for "records" that an agency has not exempted from access according to the Privacy Act's requirements.

Both appellants and the court in *Greentree*, *supra*, 674 F.2d at 79-80, note that the government's construction could result in a "third party anomaly." Because third party requests under the FOIA are protected from the Privacy Act's nondisclosure provisions by Privacy Act Section (b)(2), it is possible that a third party could have access to information about an individual that the individual himself could not obtain.

Merely showing that such an anomaly might exist, however, is not sufficient. The crucial question is whether Congress was aware of this possibility and drafted the Privacy Act to prevent it from occurring. The legislative history does not show that Congress was aware that this "third party anomaly" would arise. The floor managers of the Act explained the amendment that added Section (b)(2) to the Act as follows:

> The compromise amendment would add an additional condition of disclosure to the House bill which prohibits disclosure without written request of an individual unless disclosure of the record would be pursuant to Section 552 of the Freedom of Information Act. This compromise is designed to preserve the *status quo as interpreted by the courts* regarding the disclosure of personal information under that section (the FOIA).

---

[13] *continued*

gence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

5 U.S.C. § 552(b)(7).

Source Book at 861 (Senator Ervin's explanation to Senate), 989 (Representative Moorehead's explanation to House) (emphasis added).

Under the "status quo as interpreted by the courts" at that time, third party requesters enjoyed few rights of access to records concerning other persons. The courts interpreted FOIA Exemption 6, which exempts certain files from access where disclosure would invade personal privacy, very broadly. *See, e.g., White Hobby USA, Inc. v. IRS*, 502 F.2d 133 (3d Cir. 1974); *Rural Housing Alliance v. U.S. Dept. of Agriculture*, 498 F.2d 73 (D.C. Cir. 1974). Moreover, although Congress had amended FOIA Exemption 7 to expand access to criminal investigative records just before passing the Privacy Act, this was not the "status quo as interpreted by the courts" at that time.

Appellants also have not shown that even today the third party anomaly would arise more than rarely. As we have noted, many first party and third party requests will concern records that are not covered under the Privacy Act at all. Even where a record would be exempt from a first party request because of a Privacy Act exemption, FOIA Exemptions 6 and 7 likely would block the third party request as well.

D. Conclusion

A thorough examination of both the language of the FOIA and the Privacy Act and the relevant legislative history persuades us that the Privacy Act is a "statute" under FOIA Exemption 3. The district court properly held that because the records that Wentz and Shapiro seek are exempt from disclosure under the Privacy Act Exemption (j)(2), they may not be disclosed under a FOIA request. Since Exemption (j)(2) also covers requests for corrections, the denial of Wentz' request for correction of the allegedly inaccurate records also was proper.

Accordingly, the district court's decision granting the DEA's motion for summary judgment is affirmed.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

30

OCT [illegible]

82-C-88

82-C-88

GREGORY J. WENTZ,

Plaintiff,

v.

DRUG ENFORCEMENT ADMINISTRATION,

Defendant.

MEMORANDUM AND ORDER

ALFRED B. SHAPIRO,

Plaintiff,

82-C-243

v.

DRUG ENFORCEMENT ADMINISTRATION,

Defendant.

Before the Court are cross motions for summary judgment in the above named cases. Because the two cases raise identical issues and have been briefed in an almost identical fashion, these cases are consolidated for purposes of this order pursuant to Rule 42(a), Federal Rules of Civil Procedure.

The plaintiffs in these actions seek access to the records of the Drug Enforcement Agency which pertains to them. Disclosure of these records is sought pursuant to the Freedom of Information Act, 5 U.S.C. §552, and the Privacy Act, 5 U.S.C. §552a. Jurisdiction of this Court is invoked pursuant to 5 U.S.C. §552(a)(4)(B) and 5 U.S.C. §552a(g)(1).

Each of the plaintiffs requested, pursuant to the Privacy Act, access to information within the control of the Drug Enforcement Agency ("DEA"). Wentz' request was made in May, 1981; Shapiro's in November, 1981. After these requests were

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perfected by the plaintiffs through the submission of identifying information, DEA denied access, basing the withholding of the information in the records on exemptions provided in the Privacy Act and in the Freedom of Information Act ("FOIA"). The specific exemptions relied upon were 5 U.S.C.§552(b)(3) and 5 U.S.C. §552a(j)(2).

Wentz received the determination to deny his request in April, 1982; Shapiro in June, 1982. While each of the plaintiffs seek access to their respective files, Wentz, in addition, seeks correction of assertedly incorrect information in the records which contain his name and also seeks damages under 5 U.S.C. §552a(g)(4). The information Wentz claims is incorrect concerns the component make-up and value of the controlled substance, possession of which led to his criminal conviction, and the statement in his pre-sentence report, apparently based on DEA records, that he had been involved with drugs for a number of years prior to his conviction.

Since the exemptions which the defendant claims apply to both disclosure and correction of incorrect information, 5 U.S.C. §552a(j), the Court will treat the claims of each plaintiff identically. The plaintiffs have relied on each other's briefs and the defendant has filed virtually identical briefs on the issues raised by the summary judgment motions.

MEMORANDUM

Defendants rely on the exemption provisions of the FOIA and the Privacy Act for the proposition that any information contained in systems of records compiled for investigatory law enforcement purposes is exempt from disclosure. The applicable parts of the exemption statutes are as follows:

5 U.S.C. §552(b)

(b) This section does not apply to matters that are --

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

5 U.S.C. §552a(j)

(j) General exemptions.--The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is--

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

As it concerns the exemptions in FOIA at §552(b)(3), it is clear that the Privacy Act is a "statute" which explicitly exempts certain information from disclosure. Painter v. Federal Bureau of Investigation, 615 F.2d 689 (5th Cir. 1980). The Privacy Act, designed as it was to protect individuals from government disclosure of information about them, must be read in such a way despite plaintiffs' assertions to the contrary. Thus, plaintiffs' right to access to the records involved here must rise or fall on the Privacy Act alone.

The Privacy Act exemption relied upon by defendant requires that rules be promulgated, naming the systems of records exempted under the provisions under §552a(j). The DEA has done so at 28 C.F.R. §16.98. The affidavit of Russ Arslan, filed on behalf of the defendant in support of its summary judgment motions, states:

> I hereby verify that each and every reference to the Plaintiff found in DEA records systems is subject to exemption (j)(2) of the Privacy Act (5 U.S.C. 552a) and further, that said references are contained in criminal investigatory files which are located in a system of records that has been properly exempted as published in the Department of Justice Regulations cited at 28 C.F.R. 16.98 et.seq.[1]

The defendant reads §552a(j) to create a blanket exemption from disclosure for systems of records maintained by DEA, an agency which is obviously one which "performs as its principal function any activity pertaining to the enforcement of criminal laws . . ." It also seems clear that defendant is relying on subsections (j)(2)(B) and (C) to support the scope of the exemption claimed in these cases. According to the Arslan affidavit, all of the references to the plaintiffs appear in records subject to the (j)(2) exemption. It is therefore apparent that the systems of records which contain references to plaintiffs must be included in that list of systems at 28 C.F.R. §16.98(c). These are the only ones which are based on the (j)(2) exemption. Plaintiffs' assertions that DEA cannot depend on the (j)(2) exemption for systems listed in 28 C.F.R. §16.98(a) are correct but irrelevant because a necessary implication from the affidavit language quoted above is that the systems listed in (a)(3) are not involved.

The Court must conclude that the blanket exemption claimed by the DEA is correct. The systems involved are listed in the regulations and the reasons for the exemptions are listed with sufficient specificity to accomplish the purpose of the statute

---

[1] This statement was contained in Arslan's affidavit filed in plaintiff Wentz's action. It is virtually identical to that filed in Shapiro's action.

which required promulgation of the regulations. The arguments raised by plaintiffs have considerable force but must be rejected because of the rather sweeping language of the statute in question, §552a(j)(2). The DEA has done what the statute requires and is entitled to the exemption for the systems of records listed at 28 C.F.R. §16.98(c).

See also: Nunez v. Drug Enforcement Administration, 497 F.Supp. 209 (S.D.N.Y. 1980) (records sought relating to DEA law enforcement activities not accessible pursuant to 5 U.S.C. §552a(j)(2); Greentree v. U.S. Customs Service, 515 F.Supp. 1145 (D.C.D.C. 1981) (the Privacy Act exemption statute is a "statute" within the meaning of 5 U.S.C. §552(b)(3).

Plaintiff Wentz' claims concerning the incorrect information in the records is, as the Court has mentioned, subject to the same exemptions that have been properly raised by defendant as it concerns disclosure. Thus, the amendment to the complaint must fall on the summary judgment motion along with the claims in the original complaint. See Varona Pacheco v. Federal Bureau of Investigation, 456 F.Supp. 1024, 1034, (D.C.Puerto Rico 1978) (exemption provisions of the Privacy Act apply to correction provisions of the Act as well as to the disclosure provisions). This does not mean that plaintiff does not have a right to have accurate information before those who will make decisions concerning his sentence and parole. It only means that the forum for challenging the information is not an action under the Privacy Act.

Accordingly,

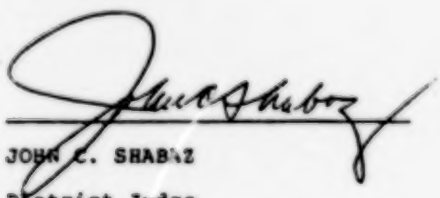
ORDER

IT IS ORDERED that plaintiffs' motions for summary judgment are DENIED.

IT IS FURTHER ORDERED that defendants' motions for summary judgment, as they concern the complaints and amendments, are GRANTED.

Entered this 6th day of October, 1982.

BY THE COURT:



JOHN C. SHABAZ
District Judge

APPENDIX C

Opinion by Judge Bauer
JUDGMENT — ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

17

November 16, 1983.

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. EDWARD R. NEAHER, Senior District Judge*

ALFRED B. SHAPIRO and GREGORY J. WENTZ,
Plaintiffs-Appellants.

Nos. 82-2818 and 82-2819 vs.

DRUG ENFORCEMENT ADMINISTRATION,
Defendant-Appellee,

Appeals from the United State District Dourt for the Western District of Wisconsin

Nos. 82-C-88 and 81-C-243
John C. Shabaz, Judge.

This cause was heard on the record from the United States District Court for the Western District of Wisconsin, _____ Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this date.

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* The Honorable Edward R. Neaher, Senior Judge of the United States District Court for the Eastern District of New York, is sitting by designation.

APPENDIX D

CIV 32
(7/83)

JUDGMENT ON DECISION BY THE COURT

31

OCT 8 1982

82-C-88

United States District Court

FOR THE

WESTERN DISTRICT OF WISCONSIN

CIVIL ACTION FILE NO.

GREGORY J. WENTZ,

Plaintiff,

vs.

DRUG ENFORCEMENT ADMINISTRATION,

Defendant.

JUDGMENT

This action came on for consideration before the Court, Honorable John C. Shabaz, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered.

It is Ordered and Adjudged that plaintiff's motion for summary judgment is DENIED. Defendant's motion for summary judgment is GRANTED.

Dated at Madison, Wisconsin, this day of October, 1982.

Joseph W. Skupniewitz
Clerk of Court

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EARSA Enquiries
this 8th day of Oct 1982
By D. Hahn
Deputy Clerk

APPENDIX E

CIV 33
(7/63)

JUDGMENT ON DECISION BY THE COURT

14

United States District Court

FOR THE

WESTERN DISTRICT OF WISCONSIN

OCT 8 1982

82-C-243

CIVIL ACTION FILE NO.

ALFRED B. SHAPIRO,

Plaintiff,

vs.

DRUG ENFORCEMENT AGENCY,

Defendant.

JUDGMENT

This action came on for consideration before the Court, Honorable John C. Shabaz, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered.

It is Ordered and Adjudged that plaintiff's motion for summary judgment is DENIED. Defendant's motion for summary judgment is GRANTED.

Dated at Madison, Wisconsin, this 8th day of October, 1982.

Joseph W. Skupniewitz
Clerk of Court

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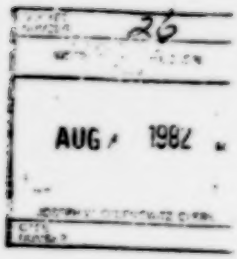
this 8th day of Oct 1982

By S. Hadar
Deputy Clerk

APPENDIX F



IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

GREGORY J. WENTZ,

Plaintiff,

v.

DRUG ENFORCEMENT ADMINISTRATION,

Defendant.

ORDER

82-C-88

The Court is in receipt of plaintiff's cross motion for summary judgment; plaintiff's motion for detailed justification, itemization and indexing under Vaughn v. Rosen, 484 F.2d 820, cert. denied 415 U.S. 977 (1974); plaintiff's amended complaint; and a letter from defendant asserting that plaintiff's response to defendant's summary judgment motion is untimely with a request that judgment for defendant be entered or, in the alternative, that an extension be granted for reply to plaintiff's response.

Plaintiff was granted an extension to respond to defendant's motion for summary judgment motion to July 19, 1982, by order dated July 2, 1982. Plaintiff subsequently informed the court that he would have difficulty meeting that deadline. His response was received on July 27, 1982. The Court is convinced that this pro se plaintiff has been diligent in complying with the court's order considering the relative legal complexity of the issue being briefed. The Court will not, therefore, entertain a motion to dismiss for failure to prosecute even if the defendant makes a proper motion.

Plaintiff's amended complaint will be accepted. Defendant has made no objection to it and it appears that defendant reasonably anticipated plaintiff's action in this regard.

1

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By J. Hahn Deputy Clerk

Plaintiff's motion under Vaughn v. Rosen will be denied at this time pending receipt of defendant's reply brief. If the court is convinced at that time that a ruling on this motion is necessary for decision on the summary judgment motions, the court will reconsider the denial and give defendant an opportunity to respond to the motion.

Defendant's request for thirty (30) days to reply to plaintiff's response and cross motion would seem to be justified in that plaintiff has expanded his complaint to include a claim that the information in his DEA file is inaccurate. However, the court must take notice of the burden on plaintiff as it concerns the inaccuracy of the information and the proof required to show wilful and intentional dissemination of such information. These burdens have clearly not been met at this stage because the government has not as yet answered concerning the claim much less admitted wilful and intentional wrongdoing. Thus summary judgment connot be granted on the claim under 5 U.S.C. §552a(g)(1)(C) because of the existence of factual disputes.

Accordingly, defendant need not reply to that portion of plaintiff's brief directed at inaccuracy of the records. The reply should be directed only at that portion of the brief which responds to plaintiff's right to access. The time given in the order below should be adequate.

Plainitff has renewed his request for appointment of counsel. The request is denied for the reasons stated in the court's previous order. In accordance with Maclin v. Freake, 650 F.2d 885 (7th Cir. 1981), the Court finds that the factual and legal issues involved are not so complex as to require the appointment of counsel. This is particularly true in this case. Plaintiff has shown a more than adequate ability to pursue his claim pro se.

ORDER

IT IS ORDERED that plaintiff's request for leave to file an amended complaint is GRANTED.

IT IS FURTHER ORDERED that plaintiff's request for appointment of counsel is DENIED.

IT IS FURTHER ORDERED that plaintiff's motion for detailed justification, itemization and indexing under Vaughn v. Rosen is DENIED.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment only as it concerns his claim under 5 U.S.C. §552a(g)(1)(C) is DENIED.

IT IS FURTHER ORDERED that defendant's reply brief is due on August 20, 1982.

Entered this 3rd day of August, 1982.

BY THE COURT:

JOHN C. SHABAZ
District Judge

APPENDIX G

16

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

NOV 1 - 1982

82-C-243

ALFRED B. SHAPIRO,

Plaintiff,

v.

DRUG ENFORCEMENT ADMINISTRATION,

Defendant.

ORDER

82-C-243

Plaintiff Alfred B. Shapiro has filed a motion for leave to proceed in forma pauperis on appeal.

Rule 24(a), Federal Rules of Appellate Procedure, provides in part:

> A party to an action in a district court who desires to proceed on appeal in forma pauperis shall file in the district court a motion for leave so to proceed, together with an affidavit, showing . . . his inability to pay fees and costs or to give security therefor, his belief that he is entitled to redress, and a statement of the issues which he intends to present on appeal. If the motion is granted, the party may proceed without further application to the court of appeals and without prepayment of fees or costs in either court or the giving of security therefor. If the motion is denied, the district court shall state in writing the reasons for the denial.

28 U.S.C. Section 1915(a) provides in part:

> An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

Good faith in this context means that the issues on appeal are not frivolous. See Coppedge v. United States, 369 U.S. 438, 445 (1961); Linden v. Harper & Row, Inc., 467 F.Supp. 566 (S.D.N.Y. 1979).

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By J. Richter
Deputy Clerk

Although this Court ordinarily requires a statement of issues to be litigated on appeal, the record of this case indicates rather clearly what action of this Court has aggrieved the plaintiff. That is whether the Freedom of Information Act and Privacy Act, 5 U.S.C. §552 and 5 U.S.C. §552a respectively, require disclosure of the items sought by plaintiff from the Drug Enforcement Agency. Since the plaintiff raised an issue which was not easily resolved, the Court finds that this appeal is taken in good faith and grants the motion to proceed in forma pauperis on appeal.

ORDER

IT IS ORDERED that plaintiff's request for leave to proceed in forma pauperis on appeal is GRANTED.

Entered this 12th day of November, 1982.

BY THE COURT:

JOHN C. SHABAZ
District Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

33

NOV 1 6 1982

GREGORY J. WENTZ,

Plaintiff,

v.

DRUG ENFORCEMENT ADMINISTRATION,

Defendant.

ORDER

82-C-88

Plaintiff Gregory J. Wentz has filed a motion for leave to proceed in forma pauperis on appeal.

Rule 24(a), Federal Rules of Appellate Procedure, provides in part:

> A party to an action in a district court who desires to proceed on appeal in forma pauperis shall file in the district court a motion for leave so to proceed, together with an affidavit, showing . . . his inability to pay fees and costs or to give security therefor, his belief that he is entitled to redress, and a statement of the issues which he intends to present on appeal. If the motion is granted, the party may proceed without further application to the court of appeals and without prepayment of fees or costs in either court or the giving of security therefor. If the motion is denied, the district court shall state in writing the reasons for the denial.

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Good faith in this context means that the issues on appeal are not frivolous. See Coppedge v. United States, 369 U.S. 438, 445 (1961); Linden v. Harper & Row, Inc., 467 F.Supp. 566 (S.D.N.Y. 1979).

Although this Court ordinarily requires a statement of issues to be litigated on appeal, the record of this case indicates rather clearly what action of this Court has aggrieved

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By S. Rustan
Deputy Clerk

the plaintiff. That is whether the Freedom of Information Act and Privacy Act, 5 U.S.C. §552 and 5 U.S.C. §552a respectively, require disclosure of the items sought by plaintiff from the Drug Enforcement Agency. Since the plaintiff raised an issue which was not easily resolved, the Court finds that this appeal is taken in good faith and grants the motion to proceed in forma pauperis on appeal.

ORDER

IT IS ORDERED that plaintiff's request for leave to proceed in forma pauperis on appeal is GRANTED.

Entered this 12th day of November, 1982.

BY THE COURT:

JOHN C. SHABAZ
District Judge

APPENDIX I
STATUTES INVOLVED

United States Code, Title 5:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

* * *

(a) Each agency shall make available to the public information as follows:

* * *

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

* * *

(b) This section does not apply to matters that are -

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose

the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

* * *

§ 552a. Records maintained on individuals

(a) Definitions

* * *

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

* * *

(b) Conditions of disclosure

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be -

* * *

(2) required under section 552 of this title;

* * *

(d) Access to records

Each agency that maintains a system of records shall -

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and -

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either -

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly

note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) Agency Requirements

Each agency that maintains a system of records shall -

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual-

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register at least annually a notice of the existence and character of the system of records, which notice shall include-

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the system;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable erforts to assure that such records are accurate, complete? timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm,

embarrassment, inconvenience, or unfairness to any individual on whom information is maintained; and

(11) at least 30 days prior to publication of information under paragragh (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency.

* * *

(j) General exemptions

The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553 (b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (3)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is -

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

* * *

(q) Effect of other laws

No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.